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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 306

ARROW LINES, INC.

PETITIONER,

vs.

BARBARA BRAMMER and
DAVID BRAMMER

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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VS:

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RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Aroow Lines, Inc., a corporation, Petitioner herein, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case as set out below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. A, infra.) is not yet officially reported.

JURISDICTION

The Order of the United States Court of Appeals for the Fourth Circuit was entered on March 5, 1970. A timely Petition for rehearing, including a suggestion for rehearing *en banc*, was filed by Petitioner; this was denied by Order entered on March 23, 1970, (App. B, infra.). The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254 (1).

QUESTIONS PRESENTED

1. Was the plaintiff Barbara Brammer guilty of contributory negligence which as a matter of law precluded recovery by her and by David Brammer, her husband?

2. Was Arrow Lines, Inc., responsible in damages to plaintiffs as a result of the actions of Dallas Whitaker, driver of a truck involved in the accident material herein, where Arrow Lines, Inc., a carrier of exempt (agricultural) commodities has an express agreement with the truck owner as independent contractor?

3. Did the court below err in holding that 49 U.S.C.A. § 304(7)(c) relating to leases by authorized motor carriers also applies to carriers of exempt commodities as set forth in the Memorandum Order of the trial court?

4. Did the court below err in holding that Arrow Lines, Inc. is not entitled to indemnification from the truck's owner despite an agreement in writing to the contrary?

5. Was proper objection made to the refusal of the trial court to give Defendant Arrow Lines Request for Charge No. 1?

STATUTES INVOLVED

The pertinent statutes involved are:

49 U.S.C.A. § 303 (b)(6):

> (b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . or (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation: . . .

49 U.S.C.A. § 304(e) and (f):

> (e) Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—
>
> (1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a

copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

(f) Nothing in this chapter shall be construed to authorize the Commission to regulate the duration of any such lease, contract, or other arrangement for the use of any motor vehicle, with driver, or the amount of compensation to be paid for such use—

(1) where the motor vehicle so to be used is that of a farmer or of a cooperative association or a federation of cooperative associations, as specified in section 303(b) (4a) or (5) of this title, or is that of a private carrier of property by motor vehicle as defined in section 303(a) (17) of this title and is used regularly in the transportation of property of a character embraced within section 303(b) (6) of this title or perishable products manufactured from perishable property of a character embraced within section 303(b) (6) of this title, and such motor vehicle is to be used by the motor

carrier in a single movement or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; or

(2) where the motor vehicle so to be used is one which has completed a movement covered by section 303(b) (6) of this title and such motor vehicle is next to be used by the motor carrier in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based.

STATEMENT OF THE CASE

This case involves a collision between an automobile being driven by Barbara Brammer and a truck being driven by one Dallas Whitaker on November 22, 1964, at an intersection in Huntington, Wayne County, West Virginia. Barbara Brammer claimed injury as a result of the action, and brought suit in which she was joined by her husband; David Brammer. David Brammer was not present at the time of the collision; his action was for expenses and loss of consortium.

Action was originally brought against several defendants, including the driver, Dallas Whitaker, but not including the present appellant, Arrow Lines, Inc. An Amended Complaint was filed to include Arrow Lines as a defendant. For a variety of reasons not here pertinent, some defendants were dismissed. The driver, Dallas Whitaker, had died in the interim and counsel for plaintiffs elected not to proceed against his estate, leaving the present parties.

The vehicle being driven by Whitaker was owned by Bazile, and was a tractor-trailer rig being used to haul agricultural commodities under an agreement in writing with Arrow Lines. The status of Whitaker as agent and employee at the time of the accident is in dispute.

The action was tried to a jury following interim motions and resulted in verdicts for the plaintiffs in the amount of $38,000.00 for Barbara Brammer and $5,000.00 for David Brammer.

Arrow Lines made various motions during and following the trial, resulting in the Memorandum Opinions (Appendices D and E) and judgments of the trial court from which appeal was made to the Fourth Circuit.

The material facts are basically not in dispute, and will be summarized here only briefly.

The facts concerning the accident as such are that Barbara Brammer and a companion were in the Brammer auto, on an errand late at night. Barbara Brammer stopped for a stoplight on a through highway, and saw the truck being driven by Whitaker approaching while she was stopped. The light in her direction turned green, and Mrs. Brammer pulled into the intersection. The truck did not stop or slow, and the collision occurred. The truck was lighted, and there were no obstructions to Mrs. Brammer's visibility.

The facts relating to the status of the truck driver, Dallas Whitaker, are also not in basic dispute. Whitaker was a driver for Bazile, and picked up a

load of frozen turkeys from Arrow Lines for a return haul, after completion of a delivery not here pertinent. He signed an agreement in writing relating to the trip, for Bazile, which is later set out herein. This was also signed by an agent for Arrow Lines. The agreement basically provided for the payment to Bazile for truck and driver at a percentage of the charges paid to Arrow Lines by the shipper. The agreed payment was made and accepted following the accident.

By agreement, determination of the status of Whitaker and the Cross-Claim of Arrow Lines against Bazile was deferred.

The Trial Court issued separate Memorandum Opinions and entered judgments thereon; the first of these denied the post-trial motions of the defendants, and the second found Arrow Lines responsible for the action of Whitaker and thus liable to plaintiffs.

ARGUMENT OF REASONS FOR GRANTING WRIT

The Negligence of Barbara Brammer. At the close of evidence, as well as before, appellant moved that a verdict for this defendant be directed on the ground that plaintiff Barbara Brammer was guilty of negligence as a matter of law. This defendant again submits that the evidence as to this issue was not in conflict, and that Barbara Brammer was guilty of negligence as a matter of law, precluding recovery by plaintiffs.

The testimony of Barbara Brammer varies only in the number of times she saw the truck being driven by Dallas Whitaker prior to the collision. It is not contradicted that the truck was open, obvious and visible to her while it was a considerable distance away and continued to be visible until the collision, without slowing, as borne out by her discovery deposition and her trial testimony. On trial, her testimony was that the distance at which she first saw the truck was 750 feet, she then looked again and saw it at 400 feet, and did not look again until just prior to the collision.

At all times, the truck was visible to her and was an open and obvious danger. Her statement, in fact, was that the truck was "Just the biggest truck I've ever seen".

It is clear that under controlling substantive law, Mrs. Brammer was guilty of contributory negligence as a matter of law. There was no conflict in fact as to this point. In the recent decision *Harner v. John McShain, Inc., of Maryland*, 4th Cir., 1968, 394 F.2d 480, 481, the court says, after stating that the trial court had properly applied West Virginia substantive law:

> . . . whether the danger was open and obvious or whether plaintiff in the exercise of due care should have seen it, is a question upon which reasonable minds may differ.

That case, however, presented a factual issue in that there was testimony from the plaintiff which indicated the danger - lack of wiring on mesh - was not visible without close inspection.

In the instant case, the evidence is that the danger was open and obvious; that being so, there was no factual issue for submission to the jury.

See *Moore v. Skyline Cab Co.*, 134 W. Va. 121, 59 S.E. 2d 437, 443. The Virginia case *Sayre v. Shields*, ... Va. ....., 164 S.E. 2d 665 (1968), summarily upheld the trial court's action in setting aside a plaintiff's verdict where plaintiff's testimony was that she did not see the defendant's vehicle. The Court said, 169 S.E. 2d at p. 667:

> . . . Reasonable men should not disagree that the plaintiff was negligent in failing to see defendant's cab, which was in plain view, and that her negligence efficiently contributed to the accident. She is thus barred from recovery, since it is apparent that the contributory negligence of the plaintiff and the primary negligence of the defendant concurred to cause the accident.

The factual situation as to Mrs. Brammer is even more aggravated than that in the above Virginia case, of course, since Mrs. Brammer's failure was to look concerning a danger of which she had prior *actual* knowledge.

The employee status of Dallas Whitaker. The deposition of Myron J. Bazile, owner of the truck involved, and his testimony under the Court's questioning, clearly show that Dallas Whitaker, driver of the truck involved in the collision with which this action is concerned, was the employee of Myron Bazile and not of Arrow Lines, Inc. Mr. Bazile testified that Whitaker was working for him on

November 22, 1964. Whitaker was paid by the mile by Bazile for driving. A lease of equipment agreement, designated Arrow Lines Exhibit "A" was attached to the deposition and Bazile received payment for Arrow Lines in accordance with that agreement. Bazile further testified that Whitaker signed that instrument for him, and that Whitaker's act in so doing was ratified by Bazile. Whitaker was under the employment, control and supervision of Bazile at the time the agreement was entered into.

In addition, Mr. Bazile's testimony was that he had accepted the payment for the carriage. He is, thus, precluded from denying Whitaker's authority for entering into the specific agreement in question.

An affidavit of David Brammer was submitted by counsel for plaintiffs, which if taken at its face would indicate Arrow Lines' employee, William Ferguson, had accepted responsibility for Whitaker's actions.

This is, of course, countered by Mr. Ferguson's affidavit, but there is one additional factor which should be determinative of this alleged acceptance; this is the fact that the Complaint originally filed did not even include Arrow Lines as a defendant, although several others were named.

Since Mr. Whitaker was at all times the employee of Myron Bazile and not of Arrow Lines. Inc., the finding of liability of Arrow Lines under the doctrine *respondeat superior* is not supported.

The Trial Court, in its Memorandum Opinion of April 1, 1969, cites 49 U.S.C.A. § 304(e), as authority for holding Arrow Lines liable.

However, 49 U.S.C.A. § 303(b) (6) excludes carriers of exempt commodities from all provisions except those relating to qualifications and maximum hours of service of employees and safety of operation or standards of equipment. It was stipulated that the carriage herein was of exempt commodities.

American Trucking Association, Inc. v. U. S., 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed 359 (1952) contains the following pertinent language, at 344 U.S. 317, 97 L. Ed 359; as to applicability of the cited statute:

> As indicated above, the Act also exempts from Commission jurisdiction "motor vehicles used in carrying property consisting of" (agricultural & similar products); § 203(b)(6) . . . *All admit, of course, that the rules do not directly apply to agricultural equipment; it is merely required that authorized carriers using such trucks comply with certain provisions.* (Emphasis added).

An authorized carrier is stated therein to be a common carrier rather than a carrier of exempt commodities. Therefore, the statute cited supports the position of Arrow Lines - not that of plaintiffs.

Failure to give Arrow Lines Request for Charge No. 1. Upon the denial of Arrow Lines Request for Charge No. 1, the Court indicated that the matters set forth could be argued by counsel for Arrow Lines. This argument as to law is not persuasive to a jury - and may not, in fact, even be cognizable - in view of the Court's instructions as to law. Arrow Lines submits that the request for charge is one which should properly have been given, and that there was no necessity for exception to its not being given.

CONCLUSION

For the reasons stated above, it is respectfully requested that this Court issue its Writ of Certiorari to review the decision below.

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13,706

Barbara Brammer and David Brammer,
Plaintiffs-Appellees,

versus

Arrow Lines, Inc., a corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. Sidney L. Christie, District Judge.

(Argued March 2, 1970 Decided March 5, 1970)

Before WINTER, CRAVEN and BUTZNER,
Circuit Judges.

C. Robert Schaub (Jenkins, Schaub & Fenstermaker on brief) for Appellants, and Norman E. Rood (Robert O. Ellis on brief) for Appellees.

PER CURIAM:

In this diversity action, arising from a motor vehicle collision, we think that the issue of plaintiff's contributory negligence was under applicable law a question solely for the jury. The jury exonerated

plaintiff. The district judge's determination that the deceased truck driver was the agent or servant of the corporate defendant was neither factually erroneous nor legally incorrect. Plaintiff's recovery was not excessive. The charge to the jury was not excepted to in the regard complained of now, and contained no manifest error.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,706

Barbara Brammer and David Brammer,

Plaintiffs-Appellees,

versus

Arrow Lines, Inc., a corporation,

Defendant-Appellant.

— ORDER —

The petition for rehearing, including a suggestion for rehearing on banc, having been considered by the original panel, no member of the Court having requested a poll on the suggestion for rehearing on banc, and the original panel unanimously being of the view that it should be denied, it is

ORDERED, that the petition for rehearing be, and it is hereby, denied.

For the Court:

s/ Harrison L. Winter
United States Circuit Judge

Filed March 23, 1970
Samuel W. Phillips, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
WEST VIRGINIA

AT HUNTINGTON

BARBARA BRAMMER and
DAVID BRAMMER,
Plaintiffs,

Vs. CIVIL ACTION NO. 2188

MYRON J. BAZILE and
ARROW LINES, INC.,
a corporation,
Defendants.

MEMORANDUM ORDER

This matter is presently before the Court upon the joint motion of defendants Myron J. Bazile and Arrow Lines, Inc. (1) that the judgment entered for the plaintiffs on the 26th day of July, 1968, upon the verdict of the jury, be set aside and that judgment be entered for the defendants as set forth in the motions for directed verdict made at the trial, or, in the alternative, (2) that the verdict and judgment be set aside and a new trial awarded the defendants on the grounds that (a) the verdict is so excessive as to each plaintiff as to show bias and prejudice on the part of the jurors, and (b) the verdict is contrary to the law and the evidence.

The case grew out of an intersectional collision between plaintiffs' automobile and defendants' truck and the issues of primary and contributory negligence of the drivers of the respective vehicles as well as the issue of the quantum of damages of each party plaintiff were tried to the Court and a jury and resulted in a verdict for the plaintiffs. The damages awarded were in the sums of $38,000 to Mrs. Brammer and $5,000 to Mr. Brammer.

A review of the trial record as to these issues and a study of the briefs of respective counsel with reference thereto convinces the Court that the evidence was sufficient to require submission of both the truck driver's primary negligence and the car driver's contributory negligence to the jury, and the Court is now precluded from disturbing the jury's verdict. See *Harner* v. *John McShain, Inc.*, 394 F.2d 480 (4th Cir. 1968). Likewise, the Court finds that, under the evidence, the awards of damages were not so grossly excessive as to require a remittitur nor the errors assigned sufficient to justify the granting of a new trial. See *Grunenthal* v. *Long Island R. Co.*, 393 U.S. 156 (1968). It is therefore

ORDERED that said motion, in both aspects, be, and the same is, hereby overruled.

The disposition thus made of the defendants' said post-trial motion on the issues of primary and contributory negligence and damages requires that the Court now take up and decide the secondary issue, provided for in the pre-trial order, involving a question of law, or a mixed question of law and fact, and which was to be submitted to the Court for resolution

in the event a verdict was rendered against either or both defendants. The pertinent part of the pre-trial order in this regard reads,

> "The parties further recognizing that whether either or both defendants are liable for the acts and conduct of Whitaker is essentially a question of law, or a mixed question of law and fact, by and through their respective counsel, have stipulated and agreed, and do hereby stipulate and agree, that in the event the jury resolves the negligence issue against Whitaker and returns a verdict against either or both defendants, then, and in that event, all issues of law and fact pertinent to the joint or separate liability of either or both defendants for payment of any such verdict, or pertinent to the cross-claim of Arrow Lines, Inc., against Bazile, shall be submitted to the Court for decision upon the record as it shall exist when such verdict is returned and upon such other evidence, documents and exhibits as any party in interest may thereafter submit, the same being pertinent. It being understood and agreed by all parties as well as by the Court that the procedure herein adopted of deferring the resolution of the issue of liability of either or both defendants for the negligence, if any, of Whitaker shall in nowise operate to prejudice any party, plaintiffs or defendants, in the question of whether either or both defendants are answerable in law for Whitaker's negligence."

By stipulation and agreement of counsel for the respective parties, in the consideration and disposition of this secondary issue, the Court is required to look to (1) the record of the negligence trial, (2) the ICC regulations, (3) Arrow's West Virginia PSC affidavit, (4) the written lease agreement be-

tween Bazile and Arrow, (5) Bazile's discovery deposition, (6) Joe Mudd's discovery deposition, (7) Edward Smith's discovery deposition, (8) Arrow's admission to plaintiffs' interrogatories, (9) Bazile's answers to plaintiffs' interrogatories, (10) the St. Louis Insurance check to A. W. & Linda Johnston for $1,608.00, (11) letter of T. R. Bolen, St. Louis' Claims Supervisor, dated November 12, 1968, (12) affidavit of David Brammer, dated July 23, 1968, and (13) William L. Ferguson's affidavit, dated February 1, 1969.

Reviewing the record as thus constituted, the salient facts and circumstances, as they relate to the secondary issue now before the Court, would appear to be:

Arrow Lines, Inc., was at and before the time of the accident a franchised carrier, engaged in interstate commerce, and had, on November 19, 1964, leased from Myron J. Bazile for the term of one year, unless sooner terminated, a tractor-trailer truck which later became involved in a collision with plaintiffs' automobile on November 22, 1964, at an intersection of U.S. Route 60 (Waverly Road) and Wayne Street, in the city of Huntington, West Virginia. The truck was driven at the time by one Dallas R. Whitaker, and was en route from Monett, Missouri, to Charleston, West Virginia, with a cargo of 840 boxes of frozen turkeys, an exempt commodity under 49 U.S.C.A., 303(b)(6). Arrow had previously filed with the Public Service Commission of West Virginia an affidavit that this type of cargo was exempt under federal regulations. The exempt status of the cargo is conceded by all parties.

Under the terms of the lease agreement, Bazile was to furnish the equipment and driver as an independent contractor, and was not to hold himself out as Arrow's agent or otherwise transact any business for Arrow without Arrow's written consent. Bazile was to bear all the operating expense of the truck and equipment and select (with Arrow's approval) the driver and pay his wages. Bazile therein also agreed to report accidents, first to Arrow's insurance carrier and then to Arrow itself, and to indemnify Arrow for his or his driver's torts. Arrow was to carry property damage, public liability and cargo insurance, but Bazile was to be liable for loss or damage to cargo not covered by insurance. Bazile, if he so desired, could carry collision insurance. Bazile was to pay all taxes on truck and equipment, but Arrow could pay such taxes and deduct the amount from the lease rental. As rental for the vehicle and equipment, Arrow agreed to pay Bazile 85% of revenue on all loads.

In answer to plaintiffs' requests for admission, Arrow stated that it accepted Whitaker as the driver of the truck leased; that it instructed him to follow all applicable laws, statutes and regulations; that it gave Whitaker a copy of the lease agreement, which was entered into in its general business as a carrier of exempt commodities; that it paid Bazile the revenue to which he was entitled for the cargo transported; that it was required by law to, and did, carry public liability insurance covering the Bazile truck, and that its insurance carrier paid the claim of a passenger in plaintiffs' car (Linda Johnston) who was injured in the accident, and that William L.

Ferguson was authorized to, and did, execute the lease agreement on its behalf,

In an affidavit, William L. Ferguson stated that he was Arrow's Branch Manager at the time the lease was entered into; that Whitaker signed the lease as Bazile's agent; that the lease was executed at Springdale, Arkansas; that it was a trip lease and that he, at the time, considered Whitaker to be the employee of Bazile rather than Arrow.

Dallas R. Whitaker died following the accident from causes not associated with it. Before his death, he had prepared a statement concerning the accident. This statement, with the part thereof detailing the manner in which the accident occurred deleted, was admitted into the record. In it, Whitaker points out that he was employed by Bazile as a driver, was paid by the mile, the "rig" was leased by Bazile to "Associated Dispatch, University Ave., St. Paul, Minnesota, and (he) was also leased to Arrow Lines, Inc;" that all hauling permits came from Arrow; that Arrow gave him the "stickers" to put on the trailer, and that the gross weight of the rig at the time was abou sixty-two or sixty-three thousand pounds.

Myron J. Bazile, in answer to interrogatories, stated that he was in the trucking business at Appleton, Wisconsin; that he leased the truck in question to Associated Dispatch of St. Paul, Minnesota, with Dallas Whitaker as driver, and that either Whitaker or Associated Dispatch later leased it to Arrow Lines, Inc. In a deposition later given, Bazile stated that he was paid by Arrow; that Associated Dispatch received a percentage of the revenue; that Whitaker

was hired by him as a driver and was paid on a mileage basis, part of which was paid Whitaker as an "advance" by Arrow; that Whitaker was authorized to sign lease agreements on his behalf and had frequently done so over the year or more of his employment with him, and that, although he did not specifically authorize Whitaker to sign the particular agreement here involved and was unaware that Whitaker had leased the truck to Arrow, nevertheless, he would have authorized it had he been asked and, further, that it was a customary and normal transaction in the trade. He also stated in his deposition that he had not been in communication with Whitaker for a week or more prior to the time of the accident and did not know where he or the truck was during this period of time. He further deposed that he possessed no authority from the ICC to operate as a common carrier in interstate commerce nor any authority from any state to operate intrastate, and that he had never applied to or received any authority or permit from the Public Service Commission of West Virginia to transport exempt commodities in that state. He agreed with Ferguson, Arrow's Branch Manager, that the undertaking in question was a trip-lease arrangement. In answer to an interrogatory, Bazile stated that Whitaker was employed by Arrow Lines, but in his deposition and in his testimony at trial he asserted that Whitaker was *his* employee. However, in each instance he was consistent in his position and statements that, normally, when a truck is leased the driver and the truck are under the control of the lessee (Arrow in this instance) until the lead is delivered, and that such is the custom of the trade. This was first brought out by Bazile on March 21, 1967, in answer to an interrogatory. He

later testified to the same effect when his deposition was taken on February 10, 1968, and again at trial on July 26, 1968. Ferguson and Arrow had ample opportunity to refute this testimony, since Ferguson's affidavit was not given until February 1, 1969, yet we can find no contradiction of it therein or at any other place in the record.

While it is quite true that, taken literally, the terminology of the lease agreement describes Bazile as an independent contractor and for whose conduct Arrow was not to be responsible. However, it is axiomatic that the consequences of the transaction are to be governed by substance, not form. More persuasive are the circumstances of the transaction, not the least of which are (a) the fact that the Bazile truck could not have undertaken the trip of all except by and with the authority possessed by Arrow and with its stickers or decals identifying the truck as an interstate common carrier in its service; (b) the fact that Arrow carried public liability and property damage insurance on the truck to protect others; (c) the fact that accidents were first to be reported to Arrow's insurance carrier and then to Arrow, and (d) the fact that Arrow's insurance carrier did in fact pay the Johnston claim arising out of the same occurrence for which it now (through Arrow) denies liability to the plaintiffs in this action. Under these and other facts and circumstances, hereinbefore detailed, Arrow cannot be allowed to escape liability for the loss sustained by the plaintiffs by reliance upon the bare terms of a prearranged contract, limiting its responsibility for the operation of the truck, concerning which plaintiffs had no notice or knowledge.

We find, moreover, that for the purpose of the trip, Dallas R. Whitaker was merely a nominal employee of Bazile and that, insofar as the performance of the particular service was concerned, he was under the control and subject to the direction of Arrow. The cargo of frozen turkeys was Arrow's — not Bazile's — to transport from Missouri to West Virginia. It was Arrow — not Bazile — who set up the trip and selected Whitaker as the driver. Bazile had no personal knowledge of the arrangement or the mission. He is involved only because he was Whitaker's employer initially and seemingly had clothed him with authority to make such a transaction in his behalf. Thus, in view of these circumstances, the nature of the undertaking and Bazile's and Arrow's common interest to be served thereby and the benefits to be derived by each therefrom, it is concluded that Whitaker was partially the agent and servant of Bazile and partially the agent and servant of Arrow, and that both are jointly answerable in law for his acts or omissions, as will be hereinafter shown. This view is in accord with Section 227 of the Restatement of the Law of Agency (Second):

> "A servant directed or permitted by his master to perform services for another may become the servant of such other in performing the service. He may become the other's servant as to some acts and not as to others."

Under the Motor Carrier Act, now known as Pt. II of the Interstate Commerce Act, 49 U.S.C.A. 304(7)(c), the Interstate Commerce Commission is authorized to prescribe regulations with respect to the use by motor carriers of motor vehicles not owned by them, such as vehicles under lease, contract or other arrangement, in the transportation of property, in-

cluding such regulations as may be reasonably necessary in order to "assure that while motor vehicles are being so used the motor carrier will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles . . . ." This delegation of power and authority by Congress to the ICC was upheld by the Supreme Court in *American Trucking Assns.* v. *United States,* 344 U.S. 298 (1953). The ICC has promulgated a set of rules and regulations pursuant to the Act, 49 C.F.R. 165, et seq. We are primarily concerned with Rule 207.4, providing, among other things, that any arrangement by authorized carriers for the use of equipment which they do not own shall be in writing . . . "shall provide for the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the authorized carrier . . . ." Obviously, the lease agreement between Bazile and Arrow is not in compliance with this regulation, since it attempts to relieve Arrow of the responsibility thereby imposed upon it as lessee of the truck. Arrow would escape the force of the regulation, however, by reliance upon Section 303(b)(6), which grants exemption to motor vehicles hauling agriculture and related products. Such reliance is ill-founded. It is our view that this section does not in any way proscribe or render inapplicable the safety elements of Section 304(7)(e) which have for their primary purpose the protection of the traveling public upon the highways.

As we have pointed out, it is established without dispute that Bazile had no certificate from any pub-

lic authority to transport property for hire in either intrastate or interstate commerce, and that he shipment with which we are here concerned could only be transported under a franchise granted by public authority. Arrow had such authority; Bazile did not. This Court will take judicial notice of the fact, as others have done, that the size of the vehicle and weight here involved posed an unreasonable risk of harm to other users of the highways. Thus, Section 428 of the Restatement of the Law of Torts (Second) is applicable:

> "An individual of a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for physical harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity."

We, therefore, believe that Arrow's defense that Bazile was, with respect to the trip and activity here involved, an independent contractor and for whose conduct it is in no way liable is not tenable under the facts and circumstances of this case. Rather, it would seem to us, Whitaker was the servant and agent of both, and both are to be held responsible for his negligence under the common law doctrine of *respondeat superior*. In taking this view, we recognize the difficulty of factually measuring and attempting to precisely delineate the degree of control possessed or exercised by either Bazile or Arrow over Whitaker subsequent to the execution of the lease and during the truck's journey from Monett, Missouri, to Huntington, West Virginia. But Bazile did say, and it

stands uncontradicted in the record, that it was the custom of the trade for Arrow to have control of the truck until the cargo was delivered, and this is consistent with Section 304(7)(e), which places responsibility upon the lessee for the operation of a leased vehicle. Having found that Arrow cannot escape this responsibility through Section 303(b), it must be held jointly liable with Bazile for the verdict and judgment rendered. We believe that this result is in accord with, and is supported by, the following case law: *Jackson* v. *Blue*, 152 F.2d 67 (4th Cir. 1945); *War Emergency Co-op. Ass'n.* v. *Widenhouse*, 169 F.2d 403 (4th Cir. 1948); *Carriers Ins.* v. *Truck Ins. Exchange*, 203 F.Supp. 764 (W.D. Va. 1962); affirmed on appeal, 310 F.2d 653 (4th Cir. 1962); *Porter* v. *St. Louis-San Francisco Railway Co.*, 354 F.2d 840 (5th Cir. 1966), citing with approval *Carriers*, supra; *American Transit Lines* v. *Smith*, 246 F. 2d 86 (6th Cir. 1957), citing with approval *Hodges* v. *Johnson*, 52 F.Supp. 488 (W.D. Va. 1943); Annotation 17 ALR 2d, Sec. 7, p. 1408. Analogous is *Sommerville* v. *Penn. Ry.*, 155 S.E.2d 865 (W. Va. 1967).

It is, therefore, ADJUDGED and ORDERED that the plaintiff Barbara Brammer do recover of and from the defendants Myron J. Bazile and Arrow Lines, Inc., a corporation, the sum of Thirty-eight Thousand ($38,000) Dollars, with interest thereon from the date of said verdict and her proper costs, as provided by law, and that the plaintiff David Brammer do recover of and from the defendants Myron J. Bazile and Arrow Lines, Inc., a corporation, the sum of Five Thousand ($5,000) Dollars, with interest thereon from the date of said verdict and his proper costs, as provided by law.

Objections and exceptions by counsel for each defendant to the aforesaid rulings and judgment of the Court are hereby noted.

The issue raised by the cross-claim of Arrow Lines, Inc., against Myron J. Bazile has not been briefed and a ruling thereon at this time is, therefore, deferred. Counsel for Arrow and Bazile should confer and advise the Court within ten (10) days with reference to their respective positions in regard to this cross-claim.

The Clerk is directed to send forthwith, by United States Mail, attested copies of this Memorandum Order to Norman E. Rood and Robert O. Ellis, counsel for the plaintiffs; Paul W. McCreight, counsel for defendant Myron J. Bazile, and C. Robert Schaub, counsel for defendant Arrow Lines, Inc., all of Huntington, West Virginia, which shall constitute due and sufficient notice to them of the entry thereof.

ENTER: April 1, 1969.

s/ SIDNEY L. CHRISTIE
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
WEST VIRGINIA

AT HUNTINGTON

BARBARA BRAMMER and
DAVID BRAMMER,
Plaintiffs,

Vs. CIVIL ACTION NO. 2188

MYRON J. BAZILE and
ARROW LINES, INC.,
a corporation,
Defendants.

MEMORANDUM ORDER

By a memorandum order entered herein on April 1, 1969, the Court determined that the defendants, Myron J. Bazile and Arrow Lines, Inc., were joint tort-feasors and as such jointly liable to the plaintiffs for the verdict previously rendered by the jury in this case.

The Court at that time left open for future determination the issue of Bazile's indemnity liability to Arrow raised by the cross-claim filed by Arrow against Bazile. In seeking indemnity, Arrow relies upon a provision in the lease agreement between Bazile, as lessor, and it, as lessee, to the effect that

"Lessor shall hold Lessee harmless from any acts or torts committed by Lessor, its agents or employees . . . ."

The question thus raised is to be determined by the Court as provided for in the pre-trial order, the pertinent portions of which are set out in the Court's memorandum order of April 1, 1969, above referred to.

Proceeding to a disposition of the matter, we interpret the indemnity provision to mean that Bazile is to hold Arrow harmless only for his negligence — not Arrow's — and insofar as the cross-claim attempts to hold Bazile responsible for Arrow's negligence, the same is unenforceable and will be dismissed. Under the interpretation we thus place upon the indemnity provision, the cross-claim becomes meaningless, since the same relief is afforded Arrow by the West Virginia statute relating to contribution by joint tort-feasors, Code 55-7-13. It is, therefore

ORDERED that the cross-claim of Arrow Lines, Inc. against Myron J. Bazile be, and the same is, hereby dismissed insofar as it would hold Bazile liable for Arrow's share of their joint liability.

The Clerk is directed to send attested copies of this memorandum order to Mr. C. Robert Schaub, attorney for Arrow Lines, Inc.; Mr. Paul W. McCreight, attorney for Myron J. Bazile; and Messrs. Robert O. Ellis and Norman E. Rood, attorneys for the plaintiffs.

ENTER: April 11, 1969

s/ SIDNEY L. CHRISTIE
United States District Judge